

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD A. HERRGARD,

Plaintiff-Appellant,

v

CATHLEEN V. FOLEY, a/k/a CATHLEEN V.
HERRGARD,

Defendant-Appellee.

UNPUBLISHED

March 2, 2006

No. 256624

Wayne Circuit Court

LC No. 91-123446-DM

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals by delayed leave granted from a circuit court order denying his motion to modify a qualified domestic relations order (QDRO). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were divorced in 1992. The consent judgment awarded defendant a share of plaintiff's pension equal to "one-half of the retirement benefits which Plaintiff earned during a period commencing on the date he entered the pension plan, and ending the date of entry of" the judgment. The parties further stipulated to entry of a QDRO with a similar provision. When plaintiff was ready to retire several years later, he learned that the plan administrator interpreted the QDRO as granting defendant half the pension payable at the time of retirement. In October 1993 plaintiff sought to modify the order to indicate specifically that defendant was entitled to half the amount that would have been payable had he retired in 1992.

A consent judgment is the product of an agreement between the parties. *Sylvania Silica Co v Berlin Twp*, 186 Mich App 73, 75; 463 NW2d 129 (1990). A consent judgment is in the nature of a contract and is to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). In general, such judgments are final and binding upon the court and the parties and cannot be modified absent fraud, mistake, or unconscionable advantage. *Staple v Staple*, 241 Mich App 562, 564; 616 NW2d 219 (2000); *Walker v Walker*, 155 Mich App 405, 406-407; 399 NW2d 541 (1986). If the consent judgment is ambiguous, the court may interpret and clarify its terms as long as the clarification does not change the substantive rights of the parties. *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987). The trial court's interpretation of a contract and whether it is ambiguous are questions of law reviewed de novo on appeal. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

In this case, the judgment of divorce and the QDRO limited defendant's share of plaintiff's pension to the benefits earned during a specific period. Further, the QDRO provided that the assignment of benefits to defendant did "not require the Plan to provide increased benefits" Any benefits earned after the period of coverage would thus be beyond what was awarded to defendant in the judgment. Because the parties' agreement as set forth in the consent judgment could not be enforced through the QDRO as intended, the trial court erred by denying plaintiff's motion to modify the QDRO.¹

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

¹ Defendant contends that plaintiff's motion was untimely and therefore could not have been properly granted. This issue was not raised and addressed at oral arguments, and defendant has failed to file as part of the record its answer to plaintiff's motion. Therefore, it is unclear whether plaintiff made this argument below, and we deem the issue unpreserved. Accordingly, we decline to address it. See *Mitchell v Detroit*, 264 Mich App 37, 45 n 2; 689 NW2d 239 (2004).